

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW MICHAEL WARSHAW,

Defendant-Appellant.

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UNPUBLISHED

January 31, 2006

No. 257589

Genesee Circuit Court

LC No. 03-012090-FC

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder under alternate theories of premeditated murder, MCL 750.316(1)(a), and felony murder, MCL 750.316(1)(b), and of unlawfully driving away an automobile (UDAA), MCL 750.413. The trial court sentenced defendant, as a third-habitual offender, MCL 769.11, to life imprisonment for the first-degree murder conviction and to 57 to 120 months' imprisonment for the UDAA conviction. Defendant appeals as of right. We affirm.

Defendant first contends that he was denied his state and federal constitutional rights to a speedy trial. See US Const, Ams VI; Const 1963, art 1, § 20. This issue is not preserved because defendant did not formally demand a speedy trial. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Unpreserved allegations of error, whether constitutional or nonconstitutional, are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In determining whether a defendant has been denied his constitutional right to a speedy trial, courts must consider: “(1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay.” *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000), quoting *People v Levandoski*, 237 Mich App 612, 620 n 4; 603 NW2d 831 (1999). A delay of less than 18 months requires a defendant to prove that he suffered prejudice as a result of the delay. *Cain, supra* at 112. On the other hand, a delay of 18 months or longer is presumed to be prejudicial, and in such cases the burden is on the prosecutor to rebut the presumption of prejudice. *Id.*

Although the delay in this case was approximately 23 months, defendant's proceedings in Macomb County caused a substantial portion of the delay. At the time the warrant for defendant's arrest in this matter was issued, defendant was already incarcerated and awaiting

trial in Macomb County on unrelated charges. Defendant was sentenced to prison in the Macomb County case on May 1, 2003, and was brought to the Genesee County Jail on the same day. His preliminary examination then commenced on May 14, 2003. The second day of defendant's preliminary examination, however, was not held until June 4, 2003, to allow defendant time to return to Macomb County in order to file documents for his appeal in the Macomb County case. To the extent that the delay caused by the Macomb County proceedings is attributable to the prosecutor, it is accorded minimal weight. Cf. *Cain, supra* at 113 (delay caused by docket congestion attributable to prosecution, but accorded minimal weight). The fact that defendant was also being prosecuted in Macomb County and was housed in the Macomb County Jail rather than in Genesee County was not the fault of the prosecutor. The delay that the multiple prosecutions caused was evident by the fact that his preliminary examination had to be adjourned for three weeks so that he could return to Macomb County to file his appellate documents in that case. Defendant was brought to the Genesee County Jail on the same day that he was sentenced in Macomb County, and his preliminary examination began 14 days later. Thus, it does not appear that the prosecutor unnecessarily delayed proceedings as a result of the Macomb County proceedings. Accordingly, although attributable to the prosecutor, we accord minimal weight to the delay of trial associated with defendant's pending charges in Macomb County.

Defendant concedes that the time between his arraignment on June 16, 2003, and the time that the trial court appointed Dr. Theodore D. Kessis as a defense expert in deoxyribonucleic acid (DNA) analysis on August 22, 2003, is attributable to him. Thereafter, defendant sought discovery of a number of items that Dr. Kessis requested in a letter dated September 8, 2003. Defendant did nothing, however, until October 20, 2003, eight days before trial was scheduled to commence, when he filed a motion to dismiss or adjourn trial because of noncompliance with Dr. Kessis' request. At the October 27, 2003 hearing on this motion, however, the trial court had nothing to enforce because defendant had never obtained a discovery order regarding the disputed items. Defendant did not obtain such an order until November 13, 2003. Thus, the delay from October 20, 2003 until November 13, 2003 is attributed to defendant because time needed to adjudicate defense motions is charged to the defendant. *Cain, supra*; see also *People v Gilmore*, 222 Mich App 442, 461; 564 NW2d 158 (1997).

On January 5, 2004, defendant filed a motion requesting certain electronic data in possession of the State Police Crime Lab, and a dispute developed regarding whether the prosecutor could legally produce the requested information. The parties agreed to present both expert witnesses for a hearing regarding production of the disputed material. As stated in *Gilmore, supra* at 461, a prosecutor may contest a defense motion without fear of violating a defendant's right to a speedy trial. In that case, this Court determined that the defendant did not demonstrate that the prosecution acted in bad faith in refusing to comply with the defendant's discovery request. *Id.* As in *Gilmore, supra*, we find the prosecution here likewise did not act in bad faith. The prosecutor contended that the lab was prohibited by statute from divulging the information requested. Nevertheless, the prosecutor offered to produce a lab employee to further explain the reasoning for failing to turn over the information. Accordingly, it appears that a genuine dispute existed regarding whether the information was discoverable, and thus any delay necessary to adjudicate defendant's motion was attributable to defendant. *Id.* Before a hearing could be conducted on whether the information was discoverable, however, Dr. Kessis withdrew from the case.

The record thus shows that much of the delay regarding the discovery request and subsequent dispute between the parties was caused by defendant's expert rather than the prosecutor. After Dr. Kessis withdrew from the case, defendant abandoned his request for the disputed information and trial commenced a few months later. At trial, defendant did not dispute the prosecutor's DNA evidence or present any DNA evidence of his own. Thus, defendant's discovery request and ensuing dispute with the prosecutor delayed trial for no gainful reason. Certainly, defendant cannot show bad faith on the part of the prosecutor who successfully opposed defendant's discovery motions and succeeded in excluding Dr. Kessis' testimony from trial. See *id.* Because much of the 23-month delay at issue here is attributable to defendant, and it does not appear that the delays attributable to the prosecutor unnecessarily delayed the proceedings, we find this factor to weigh against a conclusion that defendant was denied a speedy trial.

With respect to whether defendant asserted his constitutional right to a speedy trial, we note that while defendant made reference to a "problem" regarding his statutory right to have the charges against him brought to trial within 180 days, see MCL 780.131, he failed to file a written motion addressing that issue as directed by the trial court, and at no time asserted his constitutional right to a speedy trial. Defendant's failure to assert his constitutional right to a speedy trial weighs against a finding that he was denied a speedy trial. See, e.g., *People v Wickham*, 200 Mich App 106, 112; 503 NW2d 701 (1993).

Finally, this Court must consider whether defendant was prejudiced as a result of the delay. *Mackle, supra*. In the context of the right to a speedy trial, two types of prejudice exist: (1) prejudice to defendant's person, and (2) prejudice to his defense. *Cain, supra* at 114; *Wickham, supra*. Because this case involves a delay of more than 18 months, the prosecution bears the burden of rebutting the presumption of prejudice. *Id.* at 112. As argued by the prosecutor, the record evinces neither form of prejudice resulting from the delay. No prejudice to defendant's person occurred because he was incarcerated on an unrelated offense during the entire delay. *People v Holtzer*, 255 Mich App 478, 493; 660 NW2d 405 (2003). There was similarly no prejudice to defendant's defense as a result of the delay. Defendant contends that the prosecutor's "pre-trial shenanigans" were designed to intimidate Dr. Kessis and prevent him from participating in the case. However, although the record reflects that Dr. Kessis withdrew from the case, it does not reflect Dr. Kessis' reasons for withdrawing. As argued by the prosecution, defendant merely speculates that the prosecutor successfully intimidated Dr. Kessis into withdrawing. Moreover, after Dr. Kessis' withdrawal and the subsequent appointment of Speckin Laboratories, defendant abandoned his request for the disputed discovery items and proceeded to trial without them. At trial, defendant did not contest the prosecutor's DNA evidence and presented no DNA evidence of his own. As argued by the prosecution, defendant does not indicate how Dr. Kessis' absence negatively impacted his defense, nor does he explain why Dr. Kessis' testimony was necessary given that defendant failed to contest the prosecutor's DNA evidence at trial. Accordingly, we find the presumption of prejudice attendant the 23-month delay, which was attributable in large part to defense discovery motions on which the prosecutor ultimately prevailed, to have been successfully rebutted by the prosecution.

Balancing the length of the delay, the reasons for the delay, defendant's failure to assert his constitutional right to a speedy trial, and the absence of any prejudice deriving from the

delay, we conclude that defendant was not denied his state and federal constitutional rights to a speedy trial. Accordingly, there is no plain error requiring reversal.

Defendant also argues that he was denied his right to a speedy trial under the 180-day rule of MCL 780.131. Again, we disagree. Both MCL 780.133 and MCR 6.004(D) require dismissal of a prosecution with prejudice where an action is not commenced within the 180-day time limit set forth in MCL 780.131. The 180-day rule does not, however, require that trial actually commence within 180 days. Rather, if apparent good-faith action is taken well within that period, and the prosecutor proceeds promptly toward readying the case for trial, the rule is satisfied. MCR 6.004(D); *People v Hendershot*, 357 Mich 300, 303-304; 98 NW2d 568 (1959); *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). If the prosecutor takes good-faith action the prosecution need not be dismissed unless the initial action is followed by an inexcusable delay that evidences an intent not to bring the case to trial promptly. *People v Bradshaw*, 163 Mich App 500, 505; 415 NW2d 259 (1987).

As previously discussed, the prosecutor exercised good faith in attempting to promptly commence trial, the delay of which was primarily attributable to defendant's discovery request that he eventually abandoned after his expert withdrew from the case. As also discussed above, defendant's attempt to fault the prosecutor for Dr. Kessis' withdrawal is both speculative and unavailing, as the record does not reflect the reasons for Dr. Kessis' withdrawal and fails to support defendant's claim that Dr. Kessis withdrew because of bad faith on the part of the prosecutor. Contrary to defendant's assertion on appeal, the prosecutor had a valid basis for objecting to the discovery request. Because the prosecutor made a good-faith effort to bring defendant to trial within 180 days, dismissal of the charges is not warranted. *Id.*

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Joel P. Hoekstra  
/s/ Jane E. Markey